

No.

3678

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN BASICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

FILED
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CITATION ON WRIT OF ERROR

United States of America,
District of Oregon,—ss.

To Lester W. Humphreys, United States Attorney,
and Austin F. Flegel, Jr., Asst. United States
Attorney.

Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeal for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein John Basich is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 1st day of March, in the year of our Lord, one thousand, nine hundred and twenty-one.

R. S. BEAN,
Judge.

Due proof of service of the within Citation on Writ of Error is hereby admitted this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

John Basich,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

WRIT OF ERROR

The United States of America,—ss.

The President of the United States of America.

To the Judge of the District Court of the United
States for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between The United States of America, Plaintiff and Defendant in Error, and John Basich, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you

send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States this 1st day of March, 1921.

G. H. MARSH,

Clerk of the District Court of the United States for the District of Oregon.

(Seal of the U. S. District Court.)

Filed March 1, 1921.

G. H. Marsh, Clerk U. S. District Court.

*In the District Court of the United States for the
District of Oregon.*

July Term 1920.

BE IT REMEMBERED, That on the 12th day of October, 1920, there was duly filed in the District

Court of the United States for the District of Oregon,
an Indictment, in words and figures as follows,
to-wit:

INDICTMENT.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

John Basich,

Defendant.

INDICTMENT for Violation of Sections 21 and 3,
Title II., National Prohibition Act.

United States of America,

District of Oregon,—ss.

The Grand Jurors of the United States of America, for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations, do find, charge, allege and present:

COUNT ONE: That John Basich, the defendant above named, on, to-wit: the 4th day of August, 1920, in the vicinity of Newberg, in the County of Yamhill, in the State and District of Oregon, and within the jurisdiction of this Court, then and there being, did then and there knowingly and unlawfully

keep and maintain a common nuisance within the intent and meaning of the National Prohibition Act, to-wit: a building, wherein intoxicating liquor, to-wit: distilled spirits, fit for beverage purposes and containing more than one-half of one per cent of alcohol by volume was then and there manufactured and kept, in violation of said National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT TWO: That John Basich, the defendant above named, on, to-wit: the 4th day of August, 1920, in the vicinity of Newberg, in the County of Yamhill, in the State and District of Oregon, and within the jurisdiction of this Court then and there being, did unlawfully, knowingly and wilfully manufacture a quantity of intoxicating liquor, fit for beverage purposes, to-wit: distilled spirits, said liquor containing more than one-half of one per cent of alcohol by volume; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT THREE: That John Basich, the defendant above named, on, to-wit: the 1st day of August, 1920, did unlawfully, knowingly and wilfully transport a quantity of intoxicating liquor, fit for beverage purposes, to-wit: distilled spirits, said liquor containing more than one-half of one per cent of alcohol by volume, in a Republic automobile truck, a more particular description of said truck being to the Grand Jurors unknown, said liquor aforesaid being so transported as aforesaid from the vicinity of Newberg, in the County of Yamhill, in the State and District of Oregon, and within the jurisdiction of this Court, to a place or places to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 12th day of October, 1920.

A TRUE BILL.

B. BULLWINKER,

Foreman, United States Grand Jury.

AUSTIN F. FLEGEL, JR.

Assistant United States Attorney.

Endorsed, "A True Bill."

B. BULLWINKER,

Foreman, United States Grand Jury.

Filed, October 12, 1920.

G. H. MARSH, Clerk.

By K. F. Frazer, Deputy.

And afterwards, to-wit, on Wednesday, the 8th day of December, 1920, the same being the 31st judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

The United States of America,

vs.

John Basich.

Now at this day come the plaintiff by Mr. A. F. Flegel, Jr., Assistant United States Attorney, and the defendant above named by Mr. B. H. Goldstein, of counsel. Whereupon for plea to the indictment herein said by his said counsel, defendant says he is not guilty. And thereupon motion of plaintiff it is ordered that this be and the same is hereby set for hearing for Thursday, January 20, 1921.

And afterwards, to-wit, on Thursday, the 20th day of January, 1921, the same being the 68th judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

The United States of America,

vs.

John Basich.

Now at this day come the plaintiff by Mr. Austin F. Flegel, Jr., Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Barnett H. Goldstein, of counsel. Whereupon this being the day set for the trial of this cause, now come the following named jurors to try the issue joined, viz: Louis W. Scott, Charles C. DeWold, Charles M. Cook, J. E. Pelton, J. H. Allison, George M. Haines, E. F. Burlingham, R. Freytag, Salem J. Jones, A. B. Crosby, W. T. Hibbard, and William S. Foster; twelve good and lawful men of the district, who, being accepted by both parties and being duly impaneled and sworn, proceed to hear the evidence adduced. And the said jury, having heard the evidence adduced, and the hour of adjournment having arrived, the trial of this cause is continued to Monday, January 24, 1921, at 10 o'clock A. M.

And afterwards, to-wit, on Monday, the 24th day of January, 1921, the same being the 71st judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

The United States of America,

vs.

John Basich.

Now at this day come the plaintiff by Mr. Austin F. Flegel, Jr., Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Barnett H. Goldstein of counsel. Whereupon the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retire in charge of proper sworn officers to consider of their verdict. And thereafter said plaintiff appearing by Mr. A. F. Flegel, Jr., Assistant United States Attorney, and said defendant in his own proper person and by Mr. Barnett H. Goldstein of counsel, said jury returns to the Court the following verdict, viz:

“We, the jury duly impaneled to try the above entitled cause, do find the defendant John Basich GUILTY as charged in Count One of the indictment, GUILTY as charged in Count Two of the indictment, and NOT GUILTY as charged in Count Three of the indictment herein.

Dated at Portland, Oregon, this 24th day of January, 1921.

W. T. Hibbard, Foreman.”

Which verdict is received by the Court and ordered to be filed. Whereupon upon motion of defendant

IT IS ORDERED that the time for passing sentence upon said verdict be and the same is hereby set for tomorrow, Tuesday, January 25, 1921.

And afterwards, to-wit, on the 24th day of January, 1921, there was duly filed in said Court, the Verdict, in words and figures as follows, to-wit:

VERDICT

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

John Basich,

Defendant.

We, the jury duly impaneled to try the above entitled cause, do find the defendant JOHN BASICH

GUILTY as charged in County One of the indictment.

GUILTY as charged in Count Two of the indictment, and

NOT GUILTY as charged in Count Three of the indictment herein.

Dated at Portland, Oregon, this 24th day of January, 1921.

W. T. Hibbard, Foreman.

Filed, January 24, 1921.

G. H. Marsh, Clerk.

And afterwards, to-wit, on Wednesday, the 25th day of January, 1921, the same being the 73rd judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

The United States of America,

vs.

John Basich.

Now at this day comes the plaintiff by Mr. A. F. Flegel, Jr., Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Barnett H. Goldstein, of counsel. Whereupon this being the day set for the passing of sentence upon said defendant on the verdict heretofore returned herein

IT IS ADJUDGED that said defendant be imprisoned in the county jail of Multnomah County, Oregon, for the term of one year on the first count of the indictment herein, and that he be imprisoned in the county jail of Multnomah County, Oregon, for the term of six months on the second count of the indict-

ment herein, said term of six months to run concurrently with the term of imprisonment adjudged on the first count of the indictment, said defendant to stand committed until this sentence be performed or until he be discharged according to law.

And afterwards, to-wit, on the 18th day of April, 1921, there was duly filed in said Court, Bill of Exceptions, in words and figures as follows, to-wit:

BILL OF EXCEPTIONS.

No. C-9052.

*In the District Court of the United States for the
District of Oregon.*

United States of America,
Plaintiff,

vs.

John Basich.

Defendant.

BE IT REMEMBERED, that the above entitled cause came on for trial in the District Court of Oregon on the 20th day of January, 1921, before the Honorable R. S. Bean, judge, and a jury duly impaneled to try the cause, the government appearing by Austin F. Flegel, Jr., and the defendant appearing in person and by Barnett H. Goldstein, his counsel.

Whereupon, the government, to substantiate the issues on its part, offered in evidence certain testimony tending to prove the commission of an offense not covered by this indictment, to which testimony an exception was taken and allowed.

To illustrate this exception, the following is taken from the transcript of the evidence:

O. A. POWELL was called as a witness on behalf of the government and, being first duly sworn, testified:

DIRECT EXAMINATION.

Q. Mr. Powell, what is your occupation, please?

A. Police officer of the city of Portland.

Q. How long have you been engaged as police officer of the city of Portland?

A. Oh, about five years and a half.

Q. Five years and a half?

A. Yes.

Q. Do you know the defendant in this case, John Basich?

A. Yes, sir, I do.

Q. How long have you known him?

A. Oh, I have known him since the arrest; in June, anyway.

MR. GOLDSTEIN: Just a moment. Does counsel purpose to ask him about a certain matter that took place in June?

MR. FLEGEL: Yes, sir.

MR. GOLDSTEIN: I have a very material objection, and I feel in fairness to the defendant that the objection will take into consideration the elaboration of a certain state of facts that will be prejudicial to him except in the absence of the jury.

THE COURT: Well, I don't.

MR. GOLDSTEIN: I realize your Honor is handicapped, but I assure your Honor that this is with respect to a certain transaction that took place prior to the time of this alleged still and has no connection with the still. If there had been any evidence at all to connect this with anything else, I could possibly see there might not be the objection to the materiality.

THE COURT: I can't tell about that until I hear it.

MR. GOLDSTEIN: But it will be before the jury.

THE COURT: I can't help that. I am not going to exclude the jury every time there is an objection made to evidence. I have too much confi-

dence in the good common sense of the jury to believe they will be influenced by anything but the testimony. That has been my experience and observation.

MR. GOLDSTEIN: After objectionable evidence has been given and an objection was not made, then we realize that an objection should have been made, and I make the objection now for the purpose of the record.

THE COURT: Well, you may go ahead. That is another matter altogether.

Q. (By Mr. Flegel.) When in June did you see John Basich?

A. I saw him on the 28th of June.

Q. Where?

A. Well, I arrested him.

Q. Where?

A. At the Oak Hotel.

Q. What city?

A. Portland.

Q. What if any intoxicating liquor did he have at that time in his possession?

A. He had a suitcase containing twenty-four pints of moonshine at that time.

MR. GOLDSTEIN: If the Court please, I move at this time that that answer be stricken out, on the

ground it is incompetent, irrelevant and immaterial, and if anything at all proves the commission of another separate and distinct offense that is not incorporated in this indictment and has nothing to do with this indictment. I also want to call this to your Honor's attention. Intent is not an essential ingredient of these offenses. Either the defendant did or didn't commit what he is charged with having done, and there being no particular specific intent required of him under the provisions of this prohibition act, then what he did on another occasion, separate and distinct from the one he is charged with, merely causes the jurors to center their thoughts upon some other offense, and maybe, in their deliberations, they will possibly find him guilty or not guilty upon some other separate and distinct charge. Now your Honor can readily see the difficulty, the obstacle that is placed in the way of the defendant, handicapped as he is under ordinary circumstances, but here he is required to meet other issues that were not brought out by this indictment. I have got to come here now prepared to prove his guilt or innocence upon that charge; which I may further say, so long as it is before the jury I might as well have them know it right here and now—it is there—this is the subject of another indictment against this defendant, charging him with having on June 28th had in his possession twenty-four pints of moonshine whiskey, charging him with having transported it through the city

streets of Portland, twenty-four pints of moonshine whiskey, in violation of the National Prohibition Act. To that indictment the defendant claims he is not guilty, and the trial of that case is set for the day following the termination of this trial. He is prepared to meet that issue when it comes. Let him come now and prove his guilt or innocence, or let that be established here as to this specific charge. Why should he now be compelled to prove his guilt or innocence upon both charges? That is an entirely different charge. We might as well have had both cases consolidated for the purpose of trial instead of having the defendant now compelled to bear the burden of a separate charge, of which he is made the subject of a separate indictment, and for which he is required to separately plead and try; and I therefore contend that it is proving another offense. And if counsel does not intend to go ahead with it, then I contend that the bringing of such incompetent, highly prejudicial matter, is of great prejudice to the defendant.

THE COURT: What are you claiming to connect this with the defendant here?

MR. FLEGEL: I want to show in this case later on, if your Honor please, John Basich at or about the time he was arrested was taking away moonshine liquor from this particular plant which is the subject of this indictment. We will further show

that the moonshine liquor which was found in John Basich's possession on the morning of the 28th of June was in a very peculiar bottle, a bottle which is round on one side and has beveled corners; that these bottles are rarely used as containers for moonshine liquor. This is the only case, according to officers who are informed on the subject. I will further show that bottles of the same kind have been marked for identification, which were found at this particular still, and that bottles containing this moonshine in Basich's possession on June 28th were exactly similar with the bottles at the still. It is circumstantial evidence, if the Court please, but I believe clearly material.

THE COURT: Your purpose is to connect him with this particular transaction by showing that the liquor found in his possession was in containers similar to those that were found in this still?

MR. FLEGEL: Absolutely, your Honor; and that the liquor had the same taste and appearance and proof.

THE COURT: And you propose to follow that up, as I understand, with testimony showing that he took liquor from this place?

MR. FLEGEL: Absolutely, your Honor.

THE COURT: About this time?

MR. FLEGEL: Yes, your Honor.

THE COURT: I think it is competent then under that theory.

MR. GOLDSTEIN: Exception.

THE COURT: Unless you can connect it up with this transaction it will be taken from the jury, because they can't convict him in this case for any other offense except that with which he is charged in the indictment.

MR. FLEGEL: I appreciate that, but I will connect it in the way I have stated.

THE COURT: Yes.

Q. (By Mr. Flegel.) What if any intoxicating liquor did he have in his possession on that particular occasion?

A. He had twenty-four pints of moonshine.

MR. GOLDSTEIN: This of course, your Honor, goes in subject to our objection and exception.

THE COURT: Yes, certainly.

Q. (By Mr. Flegel.) And what kind of containers was this particular moonshine in?

A. Containers like those on the table.

Q. What did you do with the moonshine liquor which you seized from John Basich?

A. Turned it over to the property clerk at the police headquarters.

Q. And what property clerk did you turn it over to?

A. Mr. Cason.

Q. When did you turn it over to him?

A. Right away that same morning.

Q. That same morning, June 28th?

A. Yes.

Q. What kind of automobile was John Basich driving that morning?

A. Driving a Buick.

Q. What license number if any did it bear?

A. Oregon state license number 28843.

Q. What hour in the morning?

A. About seven o'clock.

THE COURT: What date was that, officer?

A. June 28th, 1920.

THE COURT: About seven o'clock in the morning, you say?

A. Yes, sir.

Q. And you turned this liquor over to the property clerk, Mr. Cason?

A. Yes, sir.

Q. Who was with you at the time?

A. What time do you mean?

Q. The time you found this liquor.

A. Officers Willard, Fair and Smith.

CROSS EXAMINATION by Mr. Goldstein.

Q. You were hiding upstairs in the Oak Hotel?

A. I was in a room in the Oak Hotel.

Q. In a room secreting yourself?

A. Yes, sir:

Q. Expecting to get somebody?

A. Yes, sir.

Q. Whom did you expect to get?

A. Whoever brought the liquor that morning, if anybody.

Q. In other words, report had come to you that somebody was going to bring some booze to the Oak Hotel?

A. Yes, sir.

Q. And there were four of you who were in hiding, eh?

A. Yes.

Q. And about seven o'clock in the morning you saw the defendant, Basich, come with an automobile?

A. Yes, sir.

Q. And he had one suitcase?

A. Yes, sir.

Q. And in the suitcase there were twenty-four pints, weren't there?

A. Yes, sir.

Q. In what containers?

A. Like those there.

Q. Where are those containers? Are they here?

A. Well, I haven't had charge of them since that date. I could not tell you.

MR. GOLDSTEIN: Do you expect to present them?

MR. FLEGEL: Yes.

Q. And what does it contain, do you know?

A. Moonshine whiskey.

Q. Well, what nature? Was it made of raisins, corn, or what?

A. I would not attempt to tell you.

Q. You remember you testified, didn't you, once that it was raisin?

A. No; I don't think I ever testified to that.

Q. You heard Inspector Beeman testify that it was raisin moonshine, didn't you?

A. Well, I don't recollect if he did.

Q. Then, they came and seized the automobile?

A. Yes, sir.

Q. And put John in jail?

A. Yes, sir.

Q. And took the twenty-four pints of moonshine away?

A. Yes, sir.

Q. You don't know where he got it?

A. No, I could not say where he got it.

Q. You don't know whether it belonged to him or how it got in the car, do you?

A. Only what he said, told me at the time.

Q. And he told you a friend of his gave it to him at Gresham?

A. Yes.

Q. And asked him to bring it in for him to town?

A. He said some one hired him to bring it in, paid him twenty-eight dollars for bringing it in.

Q. Now he speaks English with a little difficulty, doesn't he?

A. Oh, I think John speaks very fluently.

Q. You put expression to what you want to believe, don't you?

A. Oh, I don't see that it makes any difference.

Q. For instance, if he wants to tell you that the party who gave him this had paid twenty-eight dollars for it, it would not be very difficult for you to think, probably honestly, that he said he paid twenty-eight dollars for it?

A. No, no, no. He said he was hauling it for somebody from Gresham. I asked him how much he was to get for hauling it in. He says twenty-eight dollars.

Q. Are you sure you didn't ask him how much this man paid for it?

A. No; no; that wasn't it.

Q. You are sure that is not what he thought?

A. That wasn't the idea, wasn't the thought at that time, or the purpose.

Q. His English is as good as yours, is it?

A. Well now, I could not say. Probably he is of foreign birth; I believe I am of American birth. It might not be as good English, it might be better.

Q. Well, would you say that his English is better than yours?

A. No, I would not say that he speaks as fluently as I do. He speaks very fluently for a man of foreign birth, I would say.

Q. But of course for an American person he speaks very indistinctly?

A. No; no; he speaks distinctly. Of course you can tell the difference. I don't mean to say you can't.

Q. You were anxious to get him, weren't you?

A. That is what I was there that night for; sure.

Q. And you got him?

A. Yes.

CHARLES CASON was thereupon called as a witness by the government and testified as follows:

That he was property clerk at the police station in the City of Portland and took charge of all property held as evidence by the police department of the City of Portland, and that he received from Police Officers Willard and O. A. Powell a suitcase containing twenty-four pints of moonshine whiskey, taken by said officers from John Basich on the 28th day of June, and that he had delivered said suitcase and liquor so received by him from said officers to the federal prohibition agent, J. H. Beeman; that said liquor, when delivered to said Beeman, was in the same condition as it was when received by said witness.

JOSEPH BEEMAN was thereupon called as a witness by the government and, upon direct examination, testified as follows:

That he was a federal prohibition agent and had been employed as such since the enactment of the National Prohibition Act; prior to that time he was in the revenue service; that he knows John Basich, the defendant; that the two bottles handed him contained samples of liquor found in a suitcase taken from defendant on June 28, 1920; that he received these bottles from the property clerk at the city jail; that they were in a suitcase containing the twenty-four pints; that he examined the liquor and found it to be corn whiskey with some hops used in it; that on the morning of June 28th the defendant told him

he lived at 728 Wilson Street, but that he learned he had not lived there for two years, and that at the time of his arrest he was living at Union Avenue and Mason Street; that he tested the contents of these bottles and found that they actually contained corn moonshine liquor, the proof of which was marked on the bottles; that he took charge of the automobile which was seized from John Basich on that occasion; that it was a Buick automobile; that two of said bottles of liquor taken from said defendant at the time of his arrest on June 28, 1920, were admitted in evidence and marked Government's Exhibits "E" and "F."

Upon cross-examination he testified that he tested the contents of these bottles about the first of July, and that the test was made before the commissioners' hearing, at which he testified as a witness; that at the hearing he did not think he testified that it was raisin moonshine; that it was possible that he might have testified that it was raisin moonshine, but he was not sure whether he did or did not; that there was some other liquor, and there may have been some of that raisin whiskey; that there were six suitcases in the case, but that but one suitcase, containing twenty-four pints, was taken out of the car in the possession of the defendant; that so far as the other suitcases were concerned, they were taken out of a room and delivered to him; that he

was not in the room; that these two bottles, however, contained corn whiskey; that he made another test about a week ago and compared it with some other liquor; that he tested it by putting it to his mouth and rinsing his mouth out to taste it; that the test was made by smelling and tasting; that he is not particularly actuated by any bad feeling against Basich; that prior to becoming a revenue inspector he was in the saloon business; that he owned the property in a saloon and a man rented the place, and when he left the property in his hands he took it over until he could dispose of it; that he ran the saloon, which was in Southern Oregon, about eighteen months; that he is enforcing prohibition now.

Upon redirect examination, the witness testified that he compared the liquor which was found in the possession of the defendant on June 28, 1920, with the liquor taken from the still at Newberg, and that he is of the opinion that the liquor is made by the same process, of the same ingredients, and that the flasks are the same.

Upon recross-examination, he testified that he compared them about a week ago; that he originally made the test of the twenty-four pints, found in the possession of the defendant on June 28, 1920, in the early part of July, 1920; that he does not know whether the liquor which was found in the defendant's possession was in fact found in his possession

except that somebody told him; that he did not take it from his possession; that he testified at the commissioners' hearing at that time, but he did not recall whether he testified that it was raisin whiskey or not; that the reason for his making another test a week ago was because he was asked to by the District Attorney's office. He then testified he did not know whether he was asked or not, but that he reported to Mr. Flegel, the Assistant United States District Attorney, that he made a test; that he did not think anyone asked him, but that he made the test of his own volition because he had a suspicion that it was the same liquor; that the only interest he had in the case was to make a successful prosecution of a violator of the law; that he was not particularly anxious to get him, but he knew that he was a violator; that he had never personally seen him violate the law, but had reports on him; that the defendant had not been convicted yet; that he tested two bottles of the twenty-four pints that were found in the defendant's possession June 28, 1920, and that they were in a vault at the custom house until about two weeks ago, then he made a second test of this liquor with the liquor that was alleged to have been brought in from the still at Newberg; that this liquor was handed to him by Mr. Stipes, who was not present at the time he made the test; that until he made the test he did not know or have any reason for believing that the prosecuting at-

torney had any knowledge that the liquor which was found in the defendant's possession in June compared with the liquor which was taken at Newberg; that at that time he was probably notified by Mr. Flegel of the date of the trial of the violation of June 28th, at which time Mr. Flegel told him he wanted him as a witness to testify as to the kind of whiskey that was seized on June 28th. This was before he made the test, which he did without being required. He then testified that Mr. Flegel did suggest to him making a test to find out how the liquor compared.

C. R. STIPE and JOHNSON SMITH, were thereupon called as witnesses by the government and testified as follows:

That on the fourth day of August, 1920, on the W. L. Hall ranch in the vicinity of Newberg, Yamhill County, Oregon, pursuant to a government search warrant, a distilling apparatus was discovered in a cabin on said ranch; that said distilling apparatus was in operation at the time it was found by the officers; that in said cabin was also found about 800 gallons of mash in a state of fermentation, fit for distilling into spirits, said mash being prepared principally from cracked corn; that said witnesses also found in said cabin about 150 gallons of corn moonshine whiskey and about 1000 pint bottles of uniform size and shape, and that three of said

bottles, filled with samples of said corn moonshine whiskey, were offered and admitted in evidence and marked Government's Exhibits "A," "B" and "C."

DELMAR HALL, DORIS MILLER, LAWRENCE HALL and JOHN HESS were thereupon called as witnesses by the government and testified as follows:

That they had seen the defendant, John Basich, come to the Hall ranch on numerous occasions during the Spring and Summer of 1920 and go to the cabin in which said distilling apparatus was found.

DELMAR HALL further testified that he had seen the defendant bring to the Hall ranch building material from which said cabin was constructed, and also saw him bring to said cabin grain sacks which appeared to be filled.

BOB UGAN was thereupon called as a witness by the government and testified as follows:

That he was employed by the defendant on the 27th day of March, 1920, to build the cabin in which said distilling apparatus was found on the Hall ranch, and commenced the erection thereof about the first day of May, 1920, completing the same about ten or fifteen days later; that he was employed to operate said distilling apparatus for the purpose of manufacturing corn moonshine whiskey; that

said defendant agreed to pay said witness the sum of \$300.00 a month and expenses, and further promised, in the event that said witness was arrested, to pay any fine or other expense incurred by said witness; that said witness had previously been employed by defendant to operate a still in the vicinity of Boring, Oregon, on which occasion witness had been arrested and fined, and that defendant had paid his fine on said occasion; that defendant had brought to said cabin on the Hall ranch the distilling apparatus found there by the officers and had likewise brought to the cabin all supplies and materials used by witness in manufacturing said intoxicating liquor; that some 400 or 500 gallons of liquor had been manufactured by witness for defendant in said cabin at said Hall ranch prior to the time of its discovery by the officers; that the defendant, John Basich, had assisted witness in manufacturing said intoxicating liquor and had removed from said cabin all liquor so manufactured; that the mash used in the manufacture of said liquor was made from corn, sugar and hops; that it was made under defendant's direction and at his instance and request; that said liquor was bottled in bottles similar to those introduced in evidence and marked Government's Exhibits "A," "B," "C," "E" and "F;" that said intoxicating liquor was taken away from said cabin by defendant once or twice a week sometimes in lots of five or ten gallons at a time.

That after the close of the evidence and the argument of counsel, the Court charged the jury in part as follows:

“Now, there was testimony introduced in this case that in June of 1920 the defendant was apprehended with a suitcase containing liquor. He is not on trial for that offense. That evidence is to be considered by you only as bearing upon the issues tendered by the indictment in this case. It was admitted for no other purpose and is not to be considered by the jury for any other purpose. That is, unless you believe, beyond a reasonable doubt, that the defendant kept and maintained a nuisance, as I have defined that term to you, or that he manufactured intoxicating liquor, or that he transported intoxicating liquor, as stated in the indictment, you would not be justified in finding him guilty simply because you believed that he was in possession of intoxicating liquors at the time of his apprehension.”

AND, NOW, because all the foregoing matters and things are not of record in this case, I, R. S. Bean, the judge who tried the above entitled cause in the above entitled court, do hereby certify that the foregoing bill of exceptions correctly states all the proceedings had before me on the trial of said cause so far as they pertain to this particular exception,

and truly states all the rulings of the Court upon the questions of law presented; and that the exceptions taken by defendant's attorney were duly taken and allowed; that said bill of exceptions was prepared and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as and for the bill of exceptions in said cause, and the same is hereby ordered to be made a part of the record in said cause.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of April, 1921.

R. S. BEAN,
United States District Judge.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 1st day of April, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

Filed April 18, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 1st day of March, 1921, there was duly filed in said Court, a Petition for Writ of Error in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR.

No. C-9052.

*In the District Court of the United States for the
District of Oregon.*

United States of America,
Plaintiff,

vs.

John Basich,
Defendant,

Your petitioner, John Basich, defendant in the above entitled cause now comes and brings this, his petition as plaintiff in error, for a writ of error to the District Court of the United States for the District of Oregon, and thereupon your petitioner shows:

That on the 25th day of January, 1921, there was rendered and entered in the above entitled cause a judgment in and by said District Court of the United States for the District of Oregon, wherein and whereby your petitioner was sentenced and adjudged to be imprisoned in the county jail of Multnomah County, Oregon, for the term of one year on the first count of the indictment herein, and that he be imprisoned in the county jail of Multnomah County, Oregon, for the term of six months on the second count of the indictment herein; said term of six months to run concurrently with the term of im-

prisonment adjudged on the first count of the indictment.

And your petitioner further shows that he is advised by counsel that there are manifest errors in the records and proceedings at and in said cause in the rendition of said judgment and sentence, to the great damage of your petitioner, all of which errors will be made to appear by examination of the said record and more particularly by an examination of the bill of exceptions by your petitioner tendered and filed herein and in the assignments of error filed and tendered herewith.

To the end, therefore, that the said judgment, sentence and proceedings may be reversed by the United States Circuit Court of Appeals of the Ninth Circuit, your petitioner prays that a writ of error may be issued, directed therefrom to the said District Court of the United States for the District of Oregon, returnable according to law, and the practice of this Court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignments of error and all proceedings had in said cause; that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the errors, if any have happened, may be fully corrected, and full and speedy justice done your petitioner.

And your petitioner now makes his assignments of error filed herewith upon which he will rely, and which will be made to appear by the return of said record in obedience to said writ.

WHEREFORE, your petitioner prays the issuance of a writ as hereinbefore prayed for, and prays that his assignments of error filed herewith may be considered as his assignments of error upon the writ, and that the judgment rendered in this cause may be reversed and held for naught and said cause remanded for further proceedings, and also that an order be made fixing the amount of security which the said petitioner shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court against the said petitioner be suspended and stayed until the determination of the said writ of error in the said Circuit Court of Appeals.

BARNETT H. GOLDSTEIN,
Attorney for Petitioner.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy, admitted at Portland, Oregon, this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

Filed March 1, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 1st day of March, 1921, there was duly filed in said Court, Assignment of Errors in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

No. C-9052.

*In the District Court of the United States for the
District of Oregon.*

United States of America,
Plaintiff,

vs.

John Basich,
Defendant.

Now comes the plaintiff in error, the defendant above named, by his counsel, and presents this assignment of errors containing the assignment of errors upon which he will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and specifies the following particulars wherein it is claimed that the District Court erred in the course of the trial of said cause:

I.

That the court erred in overruling the objection of counsel for the defendant to the following testimony given by O. A. Powell, a witness on behalf of the government:

Q. Do you know the defendant in this case, John Basich?

A. Yes, sir, I do.

Q. How long have you known him?

A. Oh, I have known him since the arrest; in June anyway.

* * * * *

Q. When in June did you see John Basich?

A. I saw him on the 28th of June.

Q. Where?

A. Well, I arrested him.

Q. Where?

A. At the Oak Hotel.

Q. What city?

A. Portland.

Q. What, if any, intoxicating liquor did he have in his possession at that time?

A. He had a suitcase containing twenty-four pints of moonshine at that time.

* * * * *

Q. What kind of automobile was John Basich driving that morning?

A. Driving a Buick.

Q. What license number, if any, did it bear?

A. Oregon state license number 28843.

II.

That the court erred in overruling the motion of counsel for the defendant to take from the jury and to strike out the testimony of O. A. Powell tending to show the commission of an offense by the defendant not covered by the indictment herein, that is to say, testimony relating to the possession and transportation of liquor by the defendant in the City of Portland on June 28, 1920, for which offense a separate indictment was then and there pending against said defendant and for which he was not then on trial.

III.

That count I of the indictment does not state facts sufficient to constitute an offense against the laws of the United States or to apprise the defendant of the precise nature of the charge.

IV.

That count II of the indictment does not state facts sufficient to constitute an offense against the laws of the United States or to apprise the defendant of the precise nature of the charge.

V.

That the court erred in entering an order committing the defendant to twelve months in the

county jail on count I of the indictment, and to six months in the county jail on count II of the indictment.

VI.

That the judgment and sentence of the court is contrary to law.

WHEREFORE, the defendant, the plaintiff in error, prays that the above and foregoing assignment of errors be considered as his assignment of errors upon the writ of error; and further prays that the judgment heretofore rendered in this case may be reversed and held for naught, and that plaintiff in error, defendant above named, have such other and further relief as may be in conformity to law and the practice of the court.

BARNETT H. GOLDSTEIN,
Attorney for Defendant and Plaintiff in Error.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

Filed March 1, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Tuesday, the 1st day of March, 1921, the same being the 102nd judicial day of the regular November term of said Court; present the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING WRIT OR ERROR.

C-9052.

*In the District Court of the United States for the
District of Oregon.*

United States of America,
Plaintiff,

vs.

John Basich,
Defendant.

Upon reading and filing the petition of the said defendant, John Basich, for an order allowing him to prosecute a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit to the District Court of the United States for the District of Oregon, and

It appearing that said defendant has filed herein the assignment of errors relied upon, it is now therefore hereby ordered that said petition hereinbefore referred to be, and the same is, hereby allowed, and that a writ of error issue as in said petition prayed

for, and that a citation be issued and served herein, and it is further ordered that said writ of error so allowed operate as a supersedeas, and the defendant be admitted to bail upon furnishing a bond in the penal sum of Four Thousand Dollars (\$4000.00), conditioned according to law to be approved by me.

Dated March 1, 1921.

R. S. BEAN,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

Filed March 1, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 1st day of March, 1921, there was duly filed in said Court, Bail Bond on Writ of Error in words and figures as follows, to-wit:

BAIL BOND ON WRIT OF ERROR.

C-9052

*In the District Court of the United States for the
District of Oregon*

United States of America,
Plaintiff,

vs.

John Basich,
Defendant.

KNOW ALL MEN BY THESE PRESENTS, That I, John Basich, of the County of Multnomah, State of Oregon, as principal, and A. Sorich, of the County of Multnomah, State of Oregon, and W. Pavlich and John Kralovich, of the County of Multnomah, State of Oregon, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Four Thousand Dollars, to be paid to the United States of America, to which payment well and truly made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 1st day of March, in the year of our Lord, One Thousand Nine Hundred and Twenty-one.

Whereas, lately on the 25th day of January, 1921, at Portland, Oregon, in the District Court of the United States for the District of Oregon, in a cause pending in said Court between the United States of America, plaintiff, and John Basich, defendant, a judgment and sentence was rendered against said John Basich, and said John Basich obtained a writ of error from the United States Circuit

Court of Appeals for the Ninth Circuit to the United States District Court to reverse the judgment and sentence in the aforesaid cause, and a citation directed to said United States of America, citing and admonishing the United States of America to be and appear in the said Court thirty days from and after the date thereof, which citation has been duly served.

Now the condition of said obligation is such, that if the said John Basich shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument or when required by law or rule of said Court, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

J. BASICH, (Seal)

A. SORICH, (Seal)

W. PAVLICH, (Seal)

JOHN KRALOVICH. (Seal)

State of Oregon,
County of Multnomah,—ss.

I, A. Sorich, W. Pavlich and I, John Kralovich, whose names are subscribed as sureties to the above described bond, being severally duly sworn, each for himself says, that I am a resident and freeholder within the State of Oregon and am worth the sum of Four Thousand Dollars over and above all property exempt from execution.

A. SORICH,
W. PAVLICH,
JOHN KRALOVICH.

Subscribed and sworn to before me this 1st day of March, 1921.

G. H. MARSH,
Clerk, United States District Court
District of Oregon.

(Seal)

Approved by:
R. S. BEAN, Judge.

State of Oregon,
County of Multnomah—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant United States Attorney.

Filed March 1, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 18th day of April, 1921, there was duly filed in said Court a Stipulation in words and figures as follows, to-wit:

STIPULATION.

*In the District Court of the United States for the
District of Oregon.*

United States of America,
Plaintiff,

vs.

John Basich,
Defendant.

The attorneys for the plaintiff in error herein having prepared and compared with the original record the within printed transcript, now, therefore, it is hereby stipulated and agreed by and between the parties to the within proceedings for a writ of error, by and through their respective attorneys, that the within printed record tendered to the clerk of the United States District Court for the District of Oregon for his certificate, is a true transcript of

the record in the within cause and that the clerk of said Court shall certify the said printed transcript without comparison thereof with the original record.

BARNETT H. GOLDSTEIN,
Attorney for Plaintiff in Error.

AUSTIN F. FLEGEL, JR.,
Attorney for Defendant in Error.

Dated, April 18, 1921.

CLERK'S CERTIFICATE.

United States of America,
District of Oregon,—ss.

The attorneys for the respective parties to the within proceedings having stipulated that the within printed transcript of record, as prepared, compared and tendered to me for certification by the attorneys for the plaintiff in error, is a true transcript of the record in this cause and that I shall certify the same without comparison.

Now, therefore, in accordance with the said stipulation I, G. H. MARSH, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing transcript of record upon writ of error in the case in which John Basich is defendant and plaintiff in error, and the United States of America is plaintiff and defendant in error, is a full, true and correct tran-

script of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, the same having been compared by attorneys for plaintiff in error.

And I further certify that the fee for certifying to the within transcript, to-wit: the sum of (50 cents) has been paid by the said plaintiffs in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Portland, in said district, thisday of April, 1921.

.....
Clerk of the District Court of
the United States for the
District of Oregon.